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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONER.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case comes to this Court by Certiorari to review a decree of the Supreme Court of Illinois. An order directing that the Writ of Certiorari issue was entered by this Court on October 21, 1929. The decision of the Supreme Court of Illinois is reported in Volume 335 of the Illinois Reports, page 150.

The grounds, on which the jurisdiction of this Court is invoked, are set forth in the petition for the Writ of Cer-

tiorari. Petitioner contends that the license fee or franchise tax imposed on it, as a foreign corporation for the privilege of doing business in Illinois, burdens its interstate commerce, because interstate business was regarded as "business transacted in Illinois" in determining the proportion of its issued capital stock represented by business transacted and property located in Illinois.

The petitioner is a corporation organized under the laws of Delaware and authorized to do business in Illinois, with capital stock of the par value of $5,701,800.00 issued and outstanding. It filed its Bill of Complaint in the Circuit Court of Sangamon County to enjoin Louis L. Emmerson, then Secretary of State of Illinois, from paying over to the State Treasurer of Illinois, the amount which he had collected from the petitioner as its annual license fee or franchise tax for the year beginning July 1, 1927. (Rec. 1.)

This license fee or franchise tax was assessed and collected under Section 105 of the General Corporation Act of Illinois of 1919, as amended, for the privilege of doing business in Illinois, and was in addition to other taxes and not in lieu thereof. This section provided:

> "Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this State.
>
> In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

Petitioner is engaged in the manufacture of small arms and ammunition, with its principal place of business located at East Alton, Illinois. It has two factories, one at East Alton and the other at Springfield, Illinois. (Rec. 14.) Its total property in the year 1926 was valued at $6,924,804.92 of which $6,894,903.27 was located in Illinois. (Rec. 1.)

The total business of petitioner for that year amounted to $11,670,925.51. Of this amount $1,919,882.73 was intrastate commerce. The balance of $9,751,042.78 consisted of sales of goods from Illinois to customers outside of the state. (Rec. 1.)

Petitioner filed its annual report with the Secretary of State, setting out the amount of its par value capital stock issued, the total value of all its property, the total value of all of its property in Illinois, its total business transacted everywhere in the year 1926, and its total business for that year "transacted by it at or from places of business in Illinois." In showing business "transacted at or from places of business in Illinois" petitioner separated interstate and intrastate transactions and showed $1,919,882.73 as intrastate and $9,751,042.78 as interstate. (Rec. 2.)

The Stipulation of Facts filed in the Court below shows that the business reported in the annual report as interstate business was transacted in the following manner (Rec. 14):

Customers in other states and countries than Illinois sent orders from their respective places of business to petitioner at its places of business in Illinois. These orders provided for shipment f.o.b. petitioner's factories in Illinois to the purchasers in other states or countries. In each case a written acceptance of the order was sent by petitioner from its place of business to the customer outside the state. Petitioner then delivered the goods to a carrier and entered into contracts with the carrier to deliver the goods to the purchasers outside the state. The goods were then transported across the state lines of Illinois, and delivered to the purchasers in other states and countries by the carrier.

The Secretary of State regarded and treated this business as "business transacted in Illinois," and it was included by him in determining the proportion of petitioner's capital stock represented by property located and business transacted in Illinois. The Secretary of State used the following formula in determining this proportion:

$$\frac{\text{(Illinois) (property)}\ \$6,894,903.27 \quad \text{plus}\ \$11,670,925.51\ \text{(business in Ill. (including inter-state business)})}{\text{(Total) (property)}\ \$6,924,804.92 \quad \text{plus}\ \$11,670,925.51\ \text{(Total (business}} = .998$$

and taxed petitioner on 99.8 per cent of its issued capital stock, or $5,616,060.00. The tax so assessed was $2,808.03.

If the Secretary of State had regarded petitioner's intrastate business only as the "business transacted in this State," he would have used the following formula in determining the proportion of its stock represented by property located and business transacted in Illinois:

$$\frac{\text{(Illinois) (property)}\ \$6,894,903.27 \quad \text{plus}\ \$1,919,882.73\ \text{(Intrastate (business in) (Illinois)})}{\text{(Total) (property)}\ \$6,924,804.92 \quad \text{plus}\ \$11,670,925.51\ \text{(Total (business)}} = .552$$

Petitioner would then have been taxed on 52.2 per cent of its capital stock, or $2,958,440, and the tax would have amounted to $1,479.22.

Petitioner paid the amount demanded under protest. It then filed its Bill against the Secretary of State alleging that the tax was not assessed and collected in accordance with the provisions of Section 105 of the General Corporation Act of Illinois in that interstate business was included as "business transacted in this state"; and further alleging that if Section 105 of the Corporation Act required the inclusion of interstate business as business transacted in Illinois it was unconstitutional. (Rec. 4, 5.) Petitioner further alleged that of the amount paid, $1,328.81 was solely based upon and attributable to its interstate commerce.

A temporary injunction was granted. The case was then heard on Bill, Answer and the Stipulation of Facts, heretofore referred to, as to the nature of the business transacted. On the final hearing, the Circuit Court of Sangamon County dismissed the Bill of Complaint, and the Supreme Court of Illinois affirmed the decree of the Circuit Court.

Petitioner contends that the license fee imposed by the Secretary of State upon it is a direct burden on its interstate commerce, in violation of Clause 3, Section 8 of Article I of the Constitution of the United States.

Errors assigned in the petition as reasons for allowance of writ.

The errors set forth in the petition for writ of certiorari as reasons for allowance of the writ are found on pages 4 and 5 of the petition for writ of certiorari filed in this Court. They are—

1. The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Art. I of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.
2. The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.
3. The Supreme Court of Illinois erred in holding that the decision of this Court in the case of *Hump Hairpin Mfg.*

Company v. *Emmerson*, 258 U. S. 290, was decisive of this case.

4. The decision of this Court in the case of *Hump Hairpin Company* v. *Emmerson*, is not applicable to the present case. The interstate commerce of petitioner is the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

SUMMARY OF ARGUMENT.

I.

The decision of the Supreme Court of Illinois in the present case construes and interprets Section 105 of the Illinois General Corporation Act of 1919, as amended. By this construction, the words—"business transacted in this State"—are made to include the business described in the bill of complaint and in the stipulation of facts.

General Corporation Act of 1919, Sec. 105, as amended by Act of May 12, 1927.

Western Cartridge Co. v. *Emmerson,* 335 Ill. 150.

II.

The business so described and found by the Supreme Court of Illinois to be business transacted in Illinois under the statute, is interstate commerce.

The facts that the property is located in Illinois, that shipments originate and contracts are approved there, do not affect the interstate character of this business.

Heyman v. *Hayes,* 236 U. S. 178.

Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292.

Hump Hairpin Mfg. Co. v. *Emmerson,* 258 U. S. 290.

Eureka Pipe Line Co. v. *Hallanan,* 257 U. S. 265.

Airway Electric Appliance Corp. v. *Day,* 266 U. S. 71.

New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments* (decided Jan. 6, 1930).

Dozier v. *Alabama,* 218 U. S. 124.

III.

The license fee or franchise tax imposed under the method adopted by the Secretary of State of Illinois, and sustained by the Supreme Court of Illinois, upon the stock of the petitioner represented by the business of the petitioner described in the stipulation of facts, is a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

The inclusion of interstate business as "business transacted in Illinois, causes the portion of petitioner's issued capital stock representing its interstate business to be taxed. This tax accomplishes the same purpose as a tax on the proceeds of interstate commerce. License taxes based on such proceeds are invalid.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments* (decided Jan. 6, 1930).

A license fee on a foreign corporation for the privilege of doing business within a state based on all of its capital stock is invalid.

Western Union Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 57.
Looney v. *Crane Co.*, 245 U. S. 178.
International Paper Co. v. *Mass.*, 246 U. S. 135.
Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

The case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, is a direct authority for the invalidity of the license fee in this case.

IV.

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290 is not decisive of this case.

A. The Supreme Court of Illinois no longer shows a candid purpose to differentiate state from interstate business and tax only the former.

B. The present case was a proper case for the correction of the computation made by the Secretary of State. The Supreme Court of Illinois refused to make that correction.

C. Interstate commerce cannot be burdened by a State in which a foreign corporation has its property located and where it approves its contracts.

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

D. The interstate business of petitioner was the largest single element entering into the computation.

E. Interstate commerce may not be burdened even if the burden is slight.

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203.

Cudahy Packing Company v. *Hinkle*, 278 U. S. 460.

F. The cases cited in the *Hump Hairpin case* are not applicable to the facts in the present case.

ARGUMENT.

I.

The decision of the Supreme Court of Illinois in the present case construes and interprets Section 105 of the Illinois General Corporation Act of 1919 as amended. By this construction, the words: "business transacted in this State" are made to include the business described in the bill of complaint and in the stipulation of facts.

Section 105 of the General Corporation Act of Illinois provides that corporations, both foreign and domestic, shall pay an annual license fee or franchise tax on the proportion of their issued capital stock "represented by business transacted and property located in this State" (Rec. 2). The Secretary of State found that all of petitioner's business was transacted in Illinois. The Supreme Court of Illinois sustained this position.

The Agreed Statement of Facts showed that $9,751,042.78 of petitioner's business consisted of sales of goods to customers outside the State of Illinois; the shipments being made from Illinois to customers outside the State, pursuant to orders sent by these customers to petitioner in Illinois and accepted by it. The shipments in every case were across the State lines of Illinois (Rec. 14). The business so transacted was reported separate from its intrastate business by petitioner in its annual report to the Secretary of State (Rec. 2).

The Supreme Court of Illinois stated in the last paragraph of its opinion the essential facts of the business covered by the stipulation of facts and by its own decision, as follows:

> "Appellant's factories and offices were located, its manufacturing operations were conducted, orders for its

goods were accepted and shipments of its products originated in this State exclusively. Assuming that the business done by appellant with residents of States other than Illinois was inter-state business, yet the license fee or franchise tax was not directly imposed or computed upon the proceeds of interstate commerce. By the provisions of Section 105 of the general Corporation act other factors necessarily enter into the calculation. All of appellant's business was transacted in this State, and it was properly included in the process of determining the proportion of its issued capital stock, represented by business transacted and property located in Illinois, upon which the franchise tax might be computed. Such a tax does not constitute a direct or substantial burden upon interstate commerce."

The Supreme Court of Illinois in this paragraph was engaged in describing the character of the business covered by the stipulation of facts. The matter before the Court was an interpretation of Section 105. The question was whether the business described came within the phrase used in the statute "business transacted in this state." It was a direct construction of that phrase. The Supreme Court of Illinois in so construing the phrase made it cover business not only of an intrastate character, but also the only business before it, which was the business described in the agreed statement of facts. It was, therefore, a direct construction that that class of business was within the scope of the phrase used in the statute. The petitioner contended that the business was interstate business and therefore could not properly fall within the purview of the phrase used in the statute. The Supreme Court of Illinois held that this very business so described did fall within the purview of the statute even though it was interstate commerce, and that in consequence it was liable to the payment of the tax imposed, and represented by its proportion of the total capital stock of the corporation.

II.

The business so described and found by the Supreme Court of Illinois to be business transacted in Illinois under the statute, is interstate commerce.

As a general definition, we may take the following from *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211 at page 241:

> "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

The business transacted by the petitioner in this case consisted of shipments of goods from Illinois to purchasers in other states pursuant to orders received by the petitioner for such goods from the purchasers. In every case the shipment went across state lines. Such transactions are interstate commerce.

Heyman v. *Hayes*, 236 U. S. 178.
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Hump Hairpin Mfg. Company v. *Emmerson*, 258 U. S. 290.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments*, decided by the Supreme Court of the United States January 6, 1930.

The Supreme Court of Illinois in its opinion admitted that this business was interstate commerce. The Court, however, seemed to be influenced by the facts that the factories and offices of petitioner were located in Illinois, that its manu-

facturing operations were conducted there, and that orders were accepted and shipments originated there.

These facts do not give any right to the State of Illinois to burden petitioner's interstate business. In the cases of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, and *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, decided January 6, 1930, all of the property was located within the state levying the license fee, and the statutes were held invalid because of the burden on interstate commerce.

Likewise, the State in which the shipments or other interstate business originate cannot impose a burden on it.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

The question what is interstate commerce does not depend on the place where the contract is made or where title passes.

Dozier v. *Alabama*, 218 U. S. 124.

None of these circumstances relied upon by the Supreme Court of Illinois affects or changes the interstate character of petitioner's business.

III.

The license fee or franchise tax imposed under the method adopted by the Secretary of State of Illinois, and sustained by the Supreme Court of Illinois, upon the stock of the petitioner represented by the business of the petitioner described in the stipulation of facts in this case, is a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

The license fee or franchise tax paid by petitioner was a direct burden on its interstate commerce. Almost one-half of the tax was paid on stock directly representing interstate commerce. The amount of the tax was almost doubled by the inclusion of interstate business as business transacted in Illinois.

The par value of the total issued capital stock is $5,701,800 (Rec. 1). The Secretary of State assessed the petitioner on $5,616,060 of its stock as the proportion of its total issued capital stock represented by property located and business transacted in Illinois. The amount of the tax so assessed was $2,808.03. The Secretary of State, in determining this proportion, used the following formula:

$$\frac{\text{(Illinois property)} + \text{(business in Ill. (including inter-state business)})}{\text{(Total property)} + \text{(Total business)}} = .998$$

$$\frac{\$6{,}894{,}903.27 + \$11{,}670{,}925.51}{\$6{,}924{,}804.92 + \$11{,}670{,}925.51} = .998$$

By the use of this formula, the Secretary of State found that 99.8 per cent of petitioner's capital stock was represented by property located and business transacted in Illinois, and taxed it on that proportion of its stock.

If the Secretary of State, in determining the proportion of the capital stock of petitioner represented by business transacted and property located in Illinois, had not included the interstate business described in the stipulation as business

transacted in Illinois, the following formula would have been used:

$$\frac{\text{(Illinois property) } \$6{,}894{,}903.27}{\text{(Total property) } \$6{,}924{,}804.92} \text{ plus } \frac{\text{(Intrastate business (in Illinois)) } \$1{,}919{,}882.73}{\text{(Total business) } \$11{,}670{,}925.51} = .552$$

If the interstate business had not been included as business transacted in Illinois, petitioner would have been taxed on 52.2 per cent of its capital stock. 52.2 per cent of the issued capital stock of petitioner amounts to $2,958,440.

The difference between $5,616,060 and $2,958,440—or $2,657,620—is the part of the capital stock directly represented by interstate business included by the Secretary of State as business transacted in Illinois in determining the proportion of its business transacted and property located in Illinois.

The tax on this sum of $2,657,620, being the part of the capital stock representing interstate commerce, amounted to $1,328.81. This part of the total license fee or franchise tax paid by the petitioner was paid by it on that part of its stock which was represented by interstate business. It was directly computed on the stock so represented, and was almost one-half of the total tax paid.

Under the construction of Section 105 of the General Corporation Act of Illinois, adopted by the Supreme Court of Illinois, whereby interstate business from places of business in Illinois is held to be business transacted in Illinois, the proportion of the capital stock representing this interstate business is directly taxed.

The amount of the tax which is attributable to such interstate commerce will vary with the amount of interstate business transacted by the corporation. As the interstate business of the foreign corporation increases or decreases, the proportion of the total tax which is directly

attributable to that interstate commerce will increase or decrease.

The proportion of the tax which interstate commerce must bear under the construction placed on the statute by the Supreme Court of Illinois varies with the amount of the interstate business. The tax accomplishes the same purpose as a direct tax on the proceeds of interstate commerce. License taxes based on such proceeds have been held invalid by this Court in many cases.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
New Jersey Telephone Co. v. *State Board of Taxes and Assessments*, decided Jan. 6, 1930.

In the case last cited, this Court held that a statute of the State of New Jersey, imposing a franchise tax on the appellant on such proportion of its gross receipts as the length of its lines or mains in the streets bears to the length of its whole lines or mains, was a direct tax on the gross receipts derived from interstate commerce and to that extent at least, was void. This Court said:

> "This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

The tax in the present case is a license fee and is computed directly on stock representing interstate commerce.

As this Court said in *Crew Levick* v. *Pennsylvania*, 245 U. S. 292, the portion of the tax "which is measured by receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." So, adapting slightly this language, we may say, with entire truth, of the effect of the construction placed by the Supreme Court of Illinois upon the statutory provision, that the portion of tax "which is measured by the stock rep-

resenting foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

The license fee or franchise tax in the present case was imposed on petitioner, a foreign corporation, for the privilege of doing business in Illinois. A State cannot require a foreign corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the State.

In the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, this Court held that a statute of the State of Kansas imposing a license fee upon a foreign corporation based on the total capital stock of the corporation was invalid for the reason that it burdened the interstate commerce of the corporation.

This case has been followed by this Court in a long line of cases involving similar statutes.

Pullman Co. v. *Kansas*, 216 U. S. 57.

Looney v. *Crane Company*, 245 U. S. 178.

International Paper Company v. *Massachusetts*, 246 U. S. 135.

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

In the case of *International Paper Co.* v. *Mass.* (*supra*), this Court outlined the following principles laid down in the cases of *Western Union Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra, and Looney* v. *Crane Co., supra.*

The Court said:

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State."

In the case of *Airway Electric Appliance Co.* v. *Day, supra,* this Court held that a license fee based on the proportion of the authorized stock of a foreign corporation represented by business and property in the State of Ohio was invalid, because it directly burdened interstate commerce.

This Court said:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

These decisions are expressly applicable to the present case. A tax on the total capital stock of a foreign corporation engaged in interstate commerce burdens that interstate commerce because "the capital stock of the corporation represents all its business of every class and all its property wherever located." *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 at 142.

The tax in the present case is invalid because the proportion of the stock on which it is based is determined by including interstate business as business transacted in Illinois.

In the present case almost one-half of the stock represents the interstate commerce of petitioner. In the cases above cited, interstate commerce is burdened because stock which represents it is necessarily included in the tax. In the present case it is burdened because the proportion of the stock representing it, is expressly included by the construction of the State Supreme Court, as part of the stock taxed.

In the cases cited, the amount of the burden is not definitely shown because the proportion of the stock representing its interstate business is not known. In the present case the amount of the burden is clearly ascertainable.

From the formulas heretofore set out in this brief (pages 14 and 15), we can determine the exact proportion of petitioner's stock represented by interstate business, by property outside the State, and by property and intrastate business in Illinois. The Secretary of State taxed petitioner on 99.8% of its total issued stock. The .2% not taxed represented

property outside Illinois. If interstate commerce had been excluded, petitioner would have been taxed on 52.2% of its stock.

.2% of petitioner's stock represented its property outside Illinois, 52.2% represented its property in Illinois and its intrastate business, 47.6% represented its interstate business.

The placing of the tax on 99.8% of petitioner's stock, representing its property in Illinois and all its intrastate and interstate business, and excluding only the part of its stock representing property outside the State, imposes the same burden on petitioner as that held invalid in the cases above cited.

IV.

The case of Hump Hairpin Mfg. Company v. Emmerson is not decisive of this case.

The Supreme Court of Illinois based its decision on the case of *Hump Hairpin Mfg. Company* v. *Emmerson,* 258 U. S. 290, and stated that it was decisive of this case.

The *Hump Hairpin* case is not decisive of the present case. The decision of this Court in that case is not applicable to the situation of the petitioner.

(A) In that case this Court said:

> "The statute and the state Supreme Court both show a candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the disputed tax * * *" (p. 293).
>
> "Clearly, the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former." (P. 295.)

The Supreme Court of Illinois no longer shows a "candid purpose to differentiate state from interstate commerce and to use only the former in determining the amount of the disputed tax." It held that the business transacted by pe-

titioner was business transacted in Illinois, and said in the present case (Rec. 28):

> "Assuming that the business done by appellant, with residents of States other than Illinois, was interstate business, yet the license fee or franchise tax was not directly imposed or computed upon the proceeds of interstate commerce."

This shows a candid purpose, not to differentiate state from interstate business, but to treat them in the same manner and to impose the tax on both.

(B) In the *Hump Hairpin* case this Court said (p. 293):

> "If the Secretary of State or the Court, in computing the tax erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation, but would not justify declaring the act unconstituional."

The present case is such a proper case. In its Annual Report to the Secretary of State, petitioner separated its interstate and intrastate business transacted from places of business in Illinois (Rec. 2). In its Bill for Injunction, it alleged that the tax was erroneously computed, and asked that the Secretary of State be enjoined from paying over the amount of the tax which was based on its interstate business (Rec. 6).

The Supreme Court of Illinois refused to correct the computation. This Court's holding that a computation including interstate commerce should be corrected, has been ignored, and the decision of this Court has been relied upon as authorizing the imposition of a burden on interstate commerce.

We respectfuly urge that under the decision of this Court in the *Hump Hairpin* case the computation by the Secretary of State in the present case should have been corrected by the Supreme Court of Illinois. In that computation interstate business was treated as intrastate by the Secretary of

State. If the statute required the computation to be made in that way (and the Supreme Court of Illinois held that it did) it is unconstitutional, as it imposes a burden on the interstate commerce of foreign corporations.

If this Court feels that the present case only involves the correction of the computation, we ask that this Court make that correction. This case is in this Court on a Writ of Certiorari. The tax imposed, irrespective of the question of the constitutionality of the statute, is repugnant to the Commerce Clause of the Constitution of the United States so far as it burdens petitioner's interstate business.

(C) This Court, in the *Hump Hairpin* case, stated that the facts that all of the Company's property was located in Illinois, that all its manufacturing operations were conducted there, and that the contracts must be approved at Chicago, "reduced the interstate element of its business to its lowest terms."

In the later case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, this Court held that the interstate business of the corporation, which was transacted in the same manner as the interstate business of petitioner in this case, was burdened by a license fee imposed under an Ohio statute on the proportion of its authorized stock represented by business and property in Ohio. All of the Airway Company's property was located in Ohio. It manufactured its product there and sold it within the State of Ohio and in interstate commerce. The District Court of the Southern District of Ohio, Eastern Division, had held (3 Fed. 2nd 369) that the interstate business of the Company, amounting to 72% of its total business, should not be included as business transacted in Ohio. That Court said:

> "The annual tax assessed against a foreign corporation is, it is true, for the privilege of exercising its franchises in the State; but, the interstate business being a factor in measuring the amount, if the tax be excessive on account of such factor, the net result is the substantial and genuine fettering of such business."

This Court held that the imposing of a license fee on authorized instead of issued capital stock imposed a burden on the interstate business of the corporation. The Court said:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff."

The "interstate element" in the business of the Airway Company was the same as that of petitioner. The interstate business which was taxed and burdened in that case was of the same kind as petitioner's interstate business.

(D) In the *Hump Hairpin* case, this Court said that the interstate business of the corporation was only one of three factors used in determining the amount of stock subject to the tax, and said—"if the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount; but if computed on the property admitted to have been in use in the State, it would be but slightly less than the amount collected."

In the present case the amount of the property in Illinois is $6,894,903.27. The amount of the intrastate business is $1,919,882.72. The interstate business amounts to $9,751,042.78.

The interstate business of petitioner was the largest single element entering into the computation. 47.6% of petitioner's stock was represented by this business. The additional tax amounted to $1,328.81, which was over forty-five per cent of the tax actually paid, and almost ninety per cent of what the tax should have been. This was due solely to the inclusion of the stock representing the interstate business of the petitioner. The burden on the interstate business was not incidental and remote.

(E) In the *Hump Hairpin* case, this Court said—(page 296):

> "At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant, and it is therefore constitutional."

This Court has expressly held in two recent cases that interstate commerce may not be burdened even if the burden is slight, and has definitely disapproved the language in earlier cases to the contrary.

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, at 218, this Court held:

> "It must now be regarded as settled that a state may not burden interstate commerce * * * under the guise of regulating or taxing intrastate business. * * * The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the case of *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460, the Court quoted the above language from the *Alpha Portland Cement* case and said:

> "*Baltic Mining Co.* v. *Massachusetts*, had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts*."

Not only the case of *Baltic Mining Co.* v. *Mass.* 231 U. S. 68, but any other case, insofar as it tends to support a different view, must likewise be definitely disapproved.

(F) The cases cited by this Court in the *Hump Hairpin* case (page 294) as sustaining state excise taxes incidentally and remotely affecting interstate commerce, have no bearing on the present case.

The taxes under consideration in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379; and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, were taxes based on gross receipts. In a long line of cases this Court has limited such taxes to cases where the tax in dispute was a property tax; was the only tax levied; and was in lieu of all other taxes.

In the case of *Galveston Ry. Co.* v. *Texas*, 210 U. S. 217, at page 226, this Court explained the *Grand Trunk Ry. Co.* case and said that the tax scheme there involved might "fairly be called a commutation tax."

When an effort was made to employ gross earnings as a basis of taxation in addition to other property taxes, the tax was held invalid. *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298.

The cases of *U. S. Glue Company* v. *Oak Creek*, 247 U. S. 321, and *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, involved state taxes on net income partly derived from interstate business. In the *United States Glue Company* case this Court said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In the *Underwood Typewriter* case this Court also pointed out that the payment of the tax was not made a condition of the right to carry on business, but its enforcement was left to the ordinary means of collecting taxes.

In the present case the tax is not a property tax. *People* v. *Emmerson*, 305 Ill. 348. It is a license fee or franchise tax for the privilege of doing business in Illinois and is in addition to all other taxes. Payment of the tax is a condition of continuing to do business within the State. The gross

receipts from interstate business, and not net income, are employed in determining the proportion of the stock on which the tax is based.

The distinction between license fees computed on the gross receipts from interstate commerce and property taxes, is clearly stated by this Court in the recent case of *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, decided Jan. 6, 1930, (*supra* p. 16). This Court there said:

> "This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce, or a license fee to be computed thereon. * * *
>
> We think it very plain that the exaction is not a tax on property nor in substitution for, or in lieu of, a property tax. Within the rule heretofore applied in this Court, the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void." (Citing cases including *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; and *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.)

In the present case over eighty-three per cent of petitioner's business was interstate business. Forty-five per cent of the tax was imposed on stock admittedly representing that business.

The long line of decisions of this Court, holding that a state cannot require a foreign corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the state, are decisive of this case.

We submit that the license fee or franchise tax imposed on petitioner constitutes a direct and substantial burden on interstate commerce, and we ask that the judgment of the Supreme Court of Illinois, holding the license fee or franchise tax valid, be reversed.

Respectfully submitted,

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